

STATUS OF PENDING EN BANC CASES

Today's Date: June 12, 2006

This report is provided for case identification and background information only and does not reflect the views of the court. When a case is heard or reheard en banc, the en banc court assumes jurisdiction over the entire case, see 28 U.S.C. § 46(c), regardless of the issue or issues that may have caused any member of the Court to vote to hear the case en banc. Summerlin v. Stewart, 309 F.3d 1193 (9th Cir. 2002)

Padilla v. Lever, 03-56259

Three-Judge Panel Opinion: 429 F.3d 910 (9th Cir. 2005)

Order Taking Case En Banc: 446 F.3d 963 (9th Cir. 2006)

Date of Order Taking Case En Banc: April 20, 2006

Status: Calendared June 22, 2006, 8:30 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of district court's dismissal of a Voting Rights Act suit by residents and voters in the Santa Ana Unified School District seeking declaratory and injunctive relief against county elections officials in charge of overseeing the recall election process in the school district because the officials failed to ensure that recall petitions were provided in Spanish as well as English.

Holding: Not yet decided.

Doe v. Kamehameha Schools, 04-15044

Three-Judge Panel Opinion: 416 F.3d 1025 (9th Cir. 2005)

Order Taking Case En Banc: 441 F.3d 1029 (9th Cir. 2006)

Date of Order Taking Case En Banc: February 22, 2006

Status: Calendared June 20, 2006, 11:00 a.m., San Francisco

Members of En Banc Court: Not yet available

Subject Matter: Appeal of district court's summary judgment in 42 U.S.C. § 1981 action brought by a non-native Hawaiian student challenging a private school's admissions policy of accepting only students of native ancestry.

Holding: Not yet decided.

Abatie v. Alta Health, 03-55601

Three-Judge Panel Opinion: 421 F.3d 1053 (9th Cir. 2005)

Order Taking Case En Banc: 437 F.3d 860 (9th Cir. 2006)

Date of Order Taking Case En Banc: February 6, 2006

Status: Argued and submitted March 23, 2006

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M.M. McKeown, Kim M. Wardlaw, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Appeal of district court's bench trial judgment dismissing an action under ERISA, 29 U.S.C. § 1001 et seq., and state law seeking life insurance and disability payments.

Holding: Not yet decided.

Maharaj v. Gonzales, 03-71066 / 03-73995

Three-Judge Panel Opinion: 416 F.3d 1088 (9th Cir. 2005)

Order Taking Case En Banc: 437 F.3d 859 (9th Cir. 2006)

Date of Order Taking Case En Banc: February 6, 2006

Status: Granted a petition for review of the denial of asylum.

En Banc Order: 2006 WL 1579870 (9th Cir. June 9, 2006)

Date of En Banc Order: June 9, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Petition for review of the Board of Immigration Appeals' determination that petitioners were ineligible for asylum because they had been firmly resettled in Canada before arriving in the United States.

Holding: Construing the firm resettlement regulations, the en banc court held that the government bears the initial burden of showing the existence of an offer of permanent resettlement through direct evidence of an offer or by surrogate evidence of sufficient force to indicate that the third country officially sanctions the alien's indefinite presence.

Perez-Enriquez v. Gonzales, 03-70244

Three-Judge Panel Opinion: 411 F.3d 1079 (9th Cir. 2005)

Order Taking Case En Banc: 436 F.3d 1097 (9th Cir. 2006)

Date of Order Taking Case En Banc: January 30, 2006

Status: Argued and submitted March 23, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Sidney R. Thomas, Barry G. Silverman, M.M.

McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan

Subject Matter: Petition for review of the Board of Immigration Appeals' affirmance of an Immigration Judge's finding that a lawful permanent resident was inadmissible due to his drug conviction.

Holding: Not yet decided.

Chamber of Commerce v. Lockyer, 03-55166 / 03-55169

Three-Judge Panel Opinion: 422 F.3d 973 (9th Cir. 2005)

Order Taking Case En Banc: 435 F.3d 999 (9th Cir. 2006)

Date of Order Taking Case En Banc: January 17, 2006

Status: Argued and submitted March 21, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Robert R. Beezer, Alex Kozinski, Andrew J. Kleinfeld, Michael D. Hawkins, Sidney R. Thomas, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Richard A. Paez, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan

Subject Matter: Whether California Assembly Bill 1889 (AB 1889), which bars employers from spending "state funds" on union-related speech, is preempted by the National Labor Relations Act.

Holding: Not yet decided.

Bradley v. Henry, 04-15919

Three-Judge Panel Opinion: 428 F.3d 811 (9th Cir. 2005)

Order Taking Case En Banc: 432 F.3d 938 (9th Cir. 2005)

Date of Order Taking Case En Banc: December 15, 2005

Status: The order scheduling the case for argument before the en banc court was vacated, and en banc proceedings are suspended pending the Supreme Court's decision in *United States v. Gonzalez-Lopez*, 399 F.3d 924 (8th Cir. 2005), cert. granted, 2006 WL 36747 (U.S. 1/6/06).

Members of En Banc Court: Not yet available

Subject Matter: Appeal of the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition challenging a first degree murder conviction.

Holding: Not yet decided.

Fernandez-Ruiz v. Gonzales, 03-74533

Three-Judge Panel Opinion: 410 F.3d 585 (9th Cir. 2005)

Order Taking Case En Banc: 431 F.3d 1212 (9th Cir. 2005)

Date of Order Taking Case En Banc: December 13, 2005

Status: Argued and submitted March 21, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Alex Kozinski, John T. Noonan, Diarmuid F. O'Scannlain, Michael D. Hawkins, Kim M. Wardlaw, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Petition for review of the Board of Immigration Appeals' affirmance of an Immigration Judge's decision rescinding lawful permanent resident status and removal order.

Holding: Not yet decided.

Kesser v. Cambra, 02-15475

Leahy v. Farmon, 01-17467

Three-Judge Panel Opinion: Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2003)

Order Taking Cases En Banc: 425 F.3d 1230 (9th Cir. 2005)

Date of Order Taking Cases En Banc: October 14, 2005

Status: Argued and submitted December 13, 2005

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Kim M. Wardlaw, Richard A. Paez, Marsha S. Berzon, Jay S. Bybee, Carlos T. Bea

Subject Matter: Appeals of denials of habeas corpus petitions involving rejection of jury challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Holding: Not yet decided.

Circu v. Gonzales, 02-73420

Three-Judge Panel Opinion: 389 F.3d 938 (9th Cir. 2004)

Order Taking Case En Banc: 427 F.3d 622 (9th Cir. 2005)

Date of Order Taking Case En Banc: October 14, 2005

Status: Granted a petition for review of the denial of asylum.

En Banc Order: 2006 WL 1579888 (9th Cir. June 9, 2006)

Date of En Banc Order: June 9, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Pamela A. Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, M.M. McKeown, Raymond C. Fisher, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan

Subject Matter: Petition for review of the Board of Immigration Appeals' decision denying asylum.

Holding: Immigration Judge abused discretion and denied due process in taking administrative notice of the State Department's 1999 Country Report on Romania, a document never introduced into evidence, without providing notice or an opportunity to challenge the contents. The Board of Immigration Appeals compounded the IJ's error by failing to remand for the IJ to afford an opportunity to rebut the Report.

Morales-Izquierdo v. Gonzales, 03-70674

Three-Judge Panel Opinion: 388 F.3d 1299 (9th Cir. 2004)

Order Taking Case En Banc: 423 F.3d 1118 (9th Cir. 2005)

Date of Order Taking Case En Banc: September 12, 2005

Status: Argued and submitted December 13, 2005. En banc proceedings are stayed pending further order of this court, January 5, 2006.

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Alex Kozinski, Pamela A. Rymer, Michael D. Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Jay S. Bybee

Subject Matter: Petition for review challenging reinstatement of prior deportation order under 8 C.F.R. § 241.8, the Attorney General's amended reinstatement procedure, as *ultra vires* to Immigration and Naturalization Act § 240(a).

Holding: Not yet decided.

United States v. Gourde, 03-30262

Three-Judge Panel Opinion: 382 F.3d 1003 (9th Cir. 2004)

Order Taking Case En Banc: 416 F.3d 961 (9th Cir. 2005)

Date of Order Taking Case En Banc: July 14, 2005

Status: Affirmed conviction for possession of visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2), and 2256, and remanded to the three-judge panel for consideration of the defendant's request for a limited remand under *United States v. Ameline*. Mandate issued May 8, 2006.

En Banc Order: 440 F.3d 1065 (9th Cir. 2006)

Date of En Banc Order: March 9, 2006

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Melvin Brunetti, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, M.M. McKeown, Ronald M. Gould, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Appeal of district court's denial of a motion to suppress images seized from the defendant's computer following which he entered a conditional guilty plea to possession of visual depictions of minors engaged in sexually

explicit conduct.

Holding: Affidavit in support of application for a warrant to search defendant's home computer contained sufficient facts to support a magistrate judge's finding that there was a "fair probability" that the computer contained evidence that the defendant violated 18 U.S.C. §§ 2252 or 2252A, given that the reasonable inference from solid facts, that the defendant received or downloaded images, easily meets the "fair probability" test of *Illinois v. Gates*, 462 U.S. 213, 246 (1983).

Nagrampa v. MailCoups, Inc., 03-15955

Three-Judge Panel Opinion: 401 F.3d 1024 (9th Cir. 2005)

Order Taking Case En Banc: 413 F.3d 1024 (9th Cir. 2005)

Date of Order Taking Case En Banc: June 28, 2005

Status: Argued and submitted September 27, 2005.

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Sidney R. Thomas, Susan P. Graber, Kim M. Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard C. Tallman, Richard R. Clifton

Subject Matter: Appeal of district court's dismissal of a diversity action as barred by the arbitration clause in the parties' franchise agreement.

Holding: Not yet decided.

Jespersen v. Harrah's Operating Company, 03-15045

Three-Judge Panel Opinion: 392 F.3d 1076 (9th Cir. 2004)

Order Taking Case En Banc: 409 F.3d 1061 (9th Cir. 2005)

Date of Order Taking Case En Banc: May 13, 2005

Status: Affirmed district court's summary judgment dismissal of employment discrimination action brought under Title VII. Mandate issued May 8, 2006.

En Banc Order: 444 F.3d 1104 (9th Cir. 2006)

Date of En Banc Order: April 14, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Alex Kozinski, Pamela A. Rymer, Barry G. Silverman, Susan P. Graber, William A. Fletcher, Richard C. Tallman, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Appeal of summary judgment in favor of Harrah's Operating Company, Inc. in bartender's action alleging she was terminated from her position at Harrah's Casino due to sex discrimination in violation of Title VII.

Holding: Plaintiff did not present evidence that Casino's employee grooming requirement, which required female bartenders to wear makeup, either created an

unequal burden on women or was imposed by the Casino as part of a policy motivated by sex stereotyping.

Landrigan v. Schriro, 00-99011

Three-Judge Panel Opinion: 272 F.3d 1221 (9th Cir. 2004)

Order Taking Case En Banc: 397 F.3d 1235 (9th Cir. 2005)

Date of Order Taking Case En Banc: February 14, 2005

Status: Argued and submitted March 24, 2005. Submission withdrawn pending the en banc disposition of *Summerlin v. Schriro*, 98-99002. Resubmitted as of March 1, 2006. Affirmed in part and reversed and remanded in part the district court's denial of habeas corpus petition in death penalty case. Mandate issued May 8, 2006.

En Banc Order: 441 F.3d 638 (9th Cir. 2006)

Date of En Banc Order: March 8, 2006

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Alex Kozinski, Michael D. Hawkins, Kim M. Wardlaw, William A. Fletcher, Marsha S. Berzon, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea

Subject Matter: Death penalty habeas corpus appeal.

Holding: Appellant demonstrated a colorable claim of ineffective assistance of counsel during the penalty phase. Appellant did not waive the opportunity to bring forth mitigating evidence because trial counsel had not made appellant aware there was other mitigating evidence that could have been presented.

Thomas v. Ashcroft, 02-71656

Three-Judge Panel Opinion: 359 F.3d 1169 (9th Cir. 2002)

Order Taking Case En Banc: 382 F.3d 1154 (9th Cir. 2004)

Date of Order Taking Case En Banc: September 3, 2004

Status: Granted petition for review of the Board of Immigration Appeals' denial of asylum and withholding of removal; remanded for the BIA to determine whether petitioners are eligible for asylum. Judgment vacated by the Supreme Court and remanded for further proceedings.

En Banc Order: 409 F.3d 1177 (9th Cir. 2005)

Date of En Banc Order: June 3, 2005

Members of En Banc Court: Mary M. Schroeder, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Michael D. Hawkins, Barry G. Silverman, Susan P. Graber, Kim M. Wardlaw, Richard A. Paez, Carlos T. Bea

Subject Matter: Whether a family may constitute a "particular social group" for

purposes of asylum or withholding of removal. Supplemental briefing to address the following questions: May a family constitute a 'particular social group' within the meaning of U.S.C. § 1101(a)(42)(A)? If a family can be a particular social group, were the petitioners for asylum in this case persecuted on account of their membership in their family?

Holding: Membership in a family may constitute membership in a particular social group for purposes of the refugee statutes.

Barapind v. Enomoto, 02-16944

Three-Judge Panel Opinion: 360 F.3d 1061 (9th Cir. 2004)

Order Taking Case En Banc: 391 F.3d 867 (9th Cir. 2004)

Date of Order Taking Case En Banc: August 23, 2004

Status: Affirmed in part and reversed in part district court's denial of a habeas petition challenging the certification of India's request to extradite petitioner. Mandate issued May 12, 2005. Supreme Court granted application for an extension of time to file a petition for a writ of certiorari.

En Banc Order: 400 F.3d 744 (9th Cir. 2005)

Date of En Banc Order: March 9, 2005

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, Pamela A. Rymer, Andrew J. Kleinfeld, Michael D. Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Richard C. Tallman, Johnnie B. Rawlinson, Consuelo M. Callahan

Subject Matter: Whether the "political offense" exception to extradition applies to a member of the All India Sikh Student Federation charged with the multiple murders of government agents in India.

Holding: For a crime to be a non-extraditable political offense under the extradition treaty with India, there must be an uprising or other violent political disturbance, and the offense must be incidental to, in the course of, or in furtherance of the uprising. The extradition court erred in finding that it was not bound by this court's holding in *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986). The extradition court did not err in finding that a murder charge was not political where the petitioner failed to submit evidence to explain the motive for the murder.

Lombardo v. Warner, 02-35269

Three-Judge Panel Opinion: 353 F.3d 774 (9th Cir. 2003)

Order Taking Case En Banc: 371 F.3d 538 (9th Cir. 2004)

Date of Order Taking Case En Banc: June 4, 2004

Status: Argued and submitted October 12, 2004. En banc court certified two

questions to the Oregon Supreme Court. Submission of the case for decision is vacated and deferred pending the Oregon Supreme Court's final response to this certification order and that court's decision in the Outdoor Media Dimensions cases.

Members of En Banc Court: Mary M. Schroeder, Warren J. Ferguson, Andrew J. Kleinfeld, A.W. Tashima, Sidney R. Thomas, M.M. McKeown, Kim M. Wardlaw, Raymond C. Fisher, Marsha S. Berzon, Richard R. Clifton, Jay S. Bybee

Subject Matter: Are highway billboard provisions of the Oregon Motorist Information Act ("OMIA") unconstitutional as a content-based regulation that favors commercial over non-commercial speech, or because the OMIA vests unbridled discretion in state officials and lacks necessary procedural safeguards?

The en banc court certified to the Oregon Supreme Court the following questions: 1. What is the meaning of the phrase “for good cause shown” as it appears in § 377.735(2)? 2. Does Oregon law supply any time limitations on the Department of Transportation acting on application for a variance under § 377.735(2)?

Holding: Not yet decided

Cooper v. Woodford, 04-70578

Three-Judge Panel Opinion: 357 F.3d 1019 (9th Cir. 2004)

Order Taking Case En Banc: 357 F.3d 1054 (9th Cir. 2004)

Date of Order Taking Case En Banc: February 9, 2004

Status: Granted capital prisoner’s application to file a second or successive application for habeas corpus in the district court; ordered execution stayed pending result of the application. Mandate issued March 2, 2004. Received notice of petition for certiorari filed with Supreme Court.

En Banc Order: 358 F.3d 1117 (9th Cir. 2004)

Date of En Banc Order: February 9, 2004

Members of En Banc Court: Mary M. Schroeder, Alex Kozinski, A.W. Tashima, Barry G. Silverman, Susan P. Graber, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee

Subject Matter: Whether Cooper should be permitted to file a second or successive petition for a writ of habeas corpus in the district court.

Holding: Cooper is entitled to file a second or successive application, because he made a prima facie case of success on the merits of his claim that it is more likely than not that no reasonable fact finder would have found him guilty.